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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION EIGHT

PATRICIA FERNANDEZ et al.,  
  
Plaintiffs and Appellants,  
  
v.  
  
SPV WATER COMPANY et al.,  
  
Defendants and Respondents.

B203902  
  
(Los Angeles County  
Super. Ct. No. BC326718)

APPEAL from a judgment of the Superior Court of Los Angeles County. Terry A. Green, Judge. Affirmed.

Law Office of Frank E. Marchetti and Frank E. Marchetti, for Plaintiffs and Appellants.

Morris Polich & Purdy, David L. Brandon and Richard A. Capella, for Defendants and Respondents.

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Plaintiffs Patricia Fernandez, Manuel Fernandez, and Carey Moisan appeal from the judgment entered after defendant SPV Water Company was granted summary adjudication of several causes of action, while SPV's several officers and directors obtained summary judgment on all causes of action. We hold that the summary judgment for the officers and directors and the summary adjudication for SPV were proper. Because plaintiffs dismissed their remaining causes of action against SPV, the judgment for SPV is final. We also reject plaintiffs' contention that the trial court erred by awarding defendants their attorney's fees.

## **FACTS AND PROCEDURAL HISTORY**

SPV Water Co. supplies water to residents of the Sierra Colony Estates housing development. Carey Moisan and Patricia Fernandez own homes in Sierra Colony. Manny Fernandez is the husband of Patricia Fernandez and lives with her but does not co-own her house.<sup>1</sup> Beginning in June 2002, Moisan and Manny became two of SPV's three directors. Manny and Moisan were accused of approving several self-dealing contracts with SPV that benefitted them and Patricia, including agreements to compensate them for past and future services and for office space rental, and to award credits against future water bills in exchange for allowing SPV to drill a test well on the Fernandez property. Based in part on those contracts, Moisan, Manny, and the other director were forced from the board of directors by a recall vote of the Sierra Colony homeowners in April 2004.<sup>2</sup>

As a result of that recall, the board of directors was expanded from three members to five. The new directors were defendants Gary Milliman, Alan Musselman, Gloria

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<sup>1</sup> We will refer to Patricia and Manny Fernandez by their first names. We will refer to Patricia and Manny collectively as the Fernandezes. When we refer to the plaintiffs, we include the Fernandezes and Moisan.

<sup>2</sup> Moisan and Manny contend they resigned from the SPV board. The record shows that they initially refused to step down, and that it took a court order to have them do so. In April 2009, Manny and Moisan pleaded no contest to several felony grand theft counts arising from their conduct as SPV board members.

Gressman, Pedro Cisneros, and Roy Altman.<sup>3</sup> Three other defendants – Joseph Stark, Dan Winther, and Jennifer Emery – served as officers of SPV.<sup>4</sup> The new board voted to rescind the disputed contracts between SPV and the plaintiffs on the grounds that they were ultra vires acts and were undisclosed acts of director self-dealing that SPV’s shareholders had not approved. After the contracts were rescinded, SPV resumed billing plaintiffs for their water usage as well as for a new “standby fee” imposed on all homes in Sierra Colony. In December 2004, SPV assessed liens on plaintiffs’ homes for unpaid water bills, a procedure allowed by SPV’s bylaws.

Plaintiffs sued SPV and the director and officer defendants, collectively defendants. The operative fourth amended complaint stated 11 causes of action. One through four were by Patricia and Moisan against only SPV for quiet title and declaratory relief, based on allegations that plaintiffs’ contracts with SPV entitled them to an offset or credit that exceeded the amount of the unpaid water bills, thereby making SPV’s property liens improper. The remaining seven causes of action were each based on the same core set of allegations. Plaintiffs alleged that the various officer and director defendants: (1) knowingly and wrongfully disregarded the credits owed plaintiffs, and instead charged them for water use, then imposed liens on their homes; (2) falsified and forged certain documents; (3) wrongly disconnected their water service; (4) exposed plaintiffs to contaminated water by hooking up SPV’s water system to another source; and (5) lied about the viability of a well and took other steps that caused SPV to incur unnecessary costs and that otherwise amounted to mismanagement of the Sierra Colony water system. Based on these allegations, plaintiffs alleged the following causes of action: By the Fernandezes against all defendants, the fifth cause of action for violating Civil Code

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<sup>3</sup> We will refer to these defendants as the director defendants.

<sup>4</sup> We will refer to these defendants as the officer defendants.

section 1708, the seventh for breach of fiduciary duty, and the ninth for negligence;<sup>5</sup> by Moisan against all defendants, the sixth for violating Civil Code section 1708, the eighth for breach of fiduciary duty, and the tenth for negligence; and, by all three plaintiffs against all defendants, for unfair business practices in violation of Business and Professions Code section 17200.

Also named as a defendant in the fifth through eleventh causes of action was John Chambers, an SPV water systems consultant, who plaintiffs alleged both negligently and fraudulently made representations and recommendations to SPV that led to testing errors and the introduction of contaminated water into the SPV system.

Defendants moved for summary judgment or summary adjudication of the individual causes of action.<sup>6</sup> Summary judgment was sought and granted as to the director and officer defendants because: (1) the director defendants acted in good faith, in part in reliance on Chambers, and were therefore protected by the business judgment rule; and (2) the officer defendants did not vote to carry out any of the disputed actions and therefore did not cause plaintiffs any damages. SPV was granted summary judgment against Manny, who was a plaintiff as to only the fifth, seventh, ninth and eleventh causes of action, because SPV did not breach any duty to Manny and did not cause him to incur any damages. SPV was granted summary adjudication of the fifth through eleventh causes of action because, based on the evidence and exhibits, it “did not breach any duty owed to the plaintiffs and did not cause the plaintiffs any harm, injury, or damage.” The trial court denied SPV summary adjudication as to the related quiet title and declaratory

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<sup>5</sup> Civil Code section 1708 states that “[e]very person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his or her rights.” It merely states a general principle of law and does not authorize a cause of action. (*Katznberg v. Regents of University of California* (2002) 29 Cal.4th 300, 327-328; *Ley v. State* (2004) 114 Cal.App.4th 1297, 1306.) Defendants never challenged these causes of action on the separate ground that Civil Code section 1708 does not provide a private right of action.

<sup>6</sup> Chambers was not a party to that motion and is not a party to this appeal. Plaintiffs eventually dismissed him from this action.

relief claims (causes of action one through four) because there were “triable issue of fact whether [Patricia] and [Moisan] are entitled to credits to be applied against any amounts due to SPV for water service, standby usage fees or assessments.”

Patricia and Moisan dismissed without prejudice the four remaining quiet title and declaratory relief causes of action against SPV, and a judgment of dismissal in favor of defendants was entered. Defendants then moved for, and were awarded, attorney’s fees of \$250,000 pursuant to an attorney’s fee clause in the SPV bylaws.

Appellants contend: (1) summary judgment and adjudication were improperly granted because defendants’ separate statement of undisputed facts was defective; (2) by denying summary adjudication to SPV on the quiet title and declaratory relief claims, the court found triable issues of fact existed as to the propriety of the liens filed by SPV on plaintiffs’ homes. Because that was one of several alleged acts of wrongdoing in the other eight causes of action, summary adjudication or summary judgment of those claims was improper; and, (3) the award of attorney’s fees was error because the judgments did not award costs and because plaintiffs voluntarily dismissed their remaining claims after the summary judgment and summary adjudication order.

### **STANDARD OF REVIEW**

Summary judgment is granted when a moving party establishes the right to the entry of judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) In reviewing an order granting summary judgment, we must assume the role of the trial court and redetermine the merits of the motion. In doing so, we must strictly scrutinize the moving party’s papers. The declarations of the party opposing summary judgment, however, are liberally construed to determine the existence of triable issues of fact. All doubts as to whether any material, triable issues of fact exist are to be resolved in favor of the party opposing summary judgment. While the appellate court must review a summary judgment motion by the same standards as the trial court, it must independently determine as a matter of law the construction and effect of the facts presented. (*Barber v. Marina Sailing, Inc.* (1995) 36 Cal.App.4th 558, 562.)

A defendant moving for summary judgment meets its burden of showing that there is no merit to a cause of action if that party has shown that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subds. (o)(2) & (p)(2).) If the defendant does so, the burden shifts to the plaintiff to show that a triable issue of fact exists as to that cause of action or defense. In doing so, the plaintiff cannot rely on the mere allegations or denial of his pleadings, “but, instead, shall set forth the specific facts showing that a triable issue of material fact exists . . . .” (*Id.*, subd. (p)(2).) A triable issue of material fact exists “if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, fn. omitted.)

## **DISCUSSION**

### *1. Defects In Defendants’ Separate Statement*

Defendants were required to support their motion with a separate statement that set forth “plainly and concisely all material facts which the moving party contends are undisputed. Each of the material facts stated shall be followed by a reference to the supporting evidence.” (Code Civ. Proc., § 437c, subd. (b)(1).) Rule 3.1350(d) of the California Rules of Court provides that this separate statement must “separately identify each cause of action, claim, issue of duty, or affirmative defense, and each supporting material fact claimed to be without dispute with respect to the cause of action, claim, issue of duty, or affirmative defense.” Plaintiffs’ primary challenge to the trial court’s summary judgment orders rests on defendants’ alleged failure to comply with this rule.

Defendants’ separate statement was not divided by individual causes of action. Instead, it globally addressed every cause of action based on the core set of facts common to them all. At the hearing, the trial court noted the separate statement suffered from that defect, and complained that it made the motion hard to understand and respond to. Even so, the court found the format “an interesting choice,” because in some respects it also

made it “easy to follow.” The court believed the way the separate statement was formatted might not permit summary adjudication of individual causes of action, leaving summary judgment as the sole option. However, the trial court also pointed out that plaintiffs disputed few of defendants’ undisputed facts.

Plaintiffs point to the trial court’s initial concerns with this format as proof that the separate statement was defective. Because the trial court later issued a formal written order granting summary adjudication for SPV and summary judgment for the officer and director defendants, we disregard its oral comments from the hearing and presume the trial court overcame those concerns. (*Jespersen v. Zubiate-Beauchamp* (2003) 114 Cal.App.4th 624, 633.) The only issue we must decide is whether the trial court abused its discretion in overlooking the defect in defendants’ separate statement. (*Collins v. Hertz Corp.* (2006) 144 Cal.App.4th 64, 73.) Although plaintiffs cite *Collins* for the proposition that the abuse of discretion standard applies, they do not discuss how the trial court abused its discretion here. We therefore deem the issue waived. (*Bode v. Los Angeles Metropolitan Medical Center* (2009) 174 Cal.App.4th 1224, 1239.)

We alternatively hold that no abuse of discretion occurred. The core purpose of the separate statement requirement is to give the parties notice of the material facts at issue and to allow the trial court to focus on those facts. (*Parkview Villas Ass’n, Inc. v. State Farm Fire and Casualty Co.* (2005) 133 Cal.App.4th 1197, 1210.) As defendants point out, they argued that the same set of undisputed facts applied to defeat each of plaintiffs’ causes of action. Plaintiffs appeared to have no difficulty in responding to the motions. We conclude the purposes behind the separate statement requirement were not violated and the trial court did not abuse its discretion by disregarding defendants’ formatting defect.

2. *The Order Denying Summary Adjudication For SPV as to the Quiet Title and Declaratory Relief Claims Did Not Preserve the Other Causes of Action*

As discussed above, plaintiffs voluntarily dismissed causes of action one through four against SPV, which were to quiet title and obtain declaratory relief based on

allegations that SPV disregarded its obligations to offset plaintiffs' water bills based on its rescinded agreements with plaintiffs. The remaining seven causes of action were based on various alleged acts of misconduct by SPV, by and through its officers and directors. In challenging the grant of summary adjudication to SPV on these seven causes of action, plaintiffs address only one alleged form of misconduct – the recordation of the liens on their homes for nonpayment of their water bills.<sup>7</sup>

According to plaintiffs, because the trial court denied SPV summary adjudication on the quiet title-declaratory relief claims, it necessarily found that triable fact issues existed concerning the lien recordation component of their other seven causes of action. Therefore, plaintiffs contend, the trial court should have denied summary adjudication of those claims too.

Even though we review the record de novo for the existence of triable fact issues, appellate review is limited to issues adequately raised in the appellants' brief. (*Jones v. P.S. Development Co., Inc.* (2008) 166 Cal.App.4th 707, 710-711.) It is plaintiffs' responsibility to affirmatively demonstrate error and point out by citation to the record and supporting authority the triable issues they contend exist. (*Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 125-126.) Plaintiffs' argument overlooks that the trial court's written statement of reasons (Code Civ. Proc., § 437c, subd. (g)) specifically determined that summary adjudication of causes of action five through

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<sup>7</sup> At the end of this portion of their argument, plaintiffs contend, almost in passing, that summary judgment was not proper as to the officer and director defendants under the business judgment rule. This contention was not supported by discussion, analysis, citation to the record, or citation to supporting authority. As a result, plaintiffs have waived any issues based on their other allegations of wrongdoing by the defendants, including any conduct by the officer and director defendants to which the business judgment rule applies. Given plaintiffs' failure to address on appeal the other aspects of defendants' motions and the trial court's ruling, we deem their argument confined solely to the order granting SPV summary adjudication. (*Bode v. Los Angeles Metropolitan Medical Center, supra*, 174 Cal.App.4th at p. 1239.) Plaintiffs also contend that the business judgment rule does not protect corporate entity SPV. Applicability of the business judgment rule to SPV need not be addressed because plaintiffs have failed to properly discuss whether SPV did anything wrong in the first place.



eleven was proper because there were no disputed facts that the defendants breached any duty owed to plaintiffs and caused them no harm. This presumably applied to the lien recordation allegations, which were part of those causes of action. Plaintiffs do not acknowledge this determination, confining their argument to the *ipse dixit* conclusion that the denial of summary adjudication as to causes of action one through four necessarily compels a holding that triable fact issues existed for the remaining causes of action with regard to the lien recordation issue. The fact is once plaintiffs dismissed the first four causes of action, the trial court's ruling on those causes of action became legally irrelevant. Plaintiffs' failure to address the issues of lack of duty and the absence of damages as to the remaining causes of action, and to demonstrate by appropriate argument that triable fact issues existed, leads us to deem the issue waived.<sup>8</sup> (*Jones, supra*, at pp. 888-889 [summary judgment affirmed when plaintiff failed to address trial court's determination that defendants had not installed machine parts that caused

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<sup>8</sup> Defendants' motion included several supposedly undisputed facts that were relevant to the lien recordation issue. SPV's separate statement said the Fernandez drilling agreement did not grant SPV an easement for access to any water discovered, and did not provide SPV with the right to take water should any be found. Plaintiffs agreed this was undisputed. SPV's separate statement also set forth the new board's approval of the fee structure for water use, as well as for a standby fee to cover indirect operating expenses. Plaintiffs said those facts were undisputed, but, without citation to any evidence, contended by way of argumentative response that those new bylaws were improper. SPV's separate statement then referenced the new board's June 2004 resolution declaring unenforceable several agreements between SPV and plaintiffs. Plaintiffs did not dispute that fact either. The new board's resolution stated that the various agreements "were in violation of State Law pertaining to undisclosed self dealing by Corporate Officers and Directors including but not limited to Corporations Code section 5233, such actions were not authorized by the Shareholders of the Corporation and represent acts *ultra vires* by the then current Officers and Directors of the Corporation . . . ." Based on that, the new board declared those contracts "unenforceable as acts of self dealing, contrary to public policy and acts *ultra vires* without proper authority or right," and said it disavowed and refused to ratify those agreements. Although plaintiffs' appellate brief discusses in general the notion of *ultra vires* acts, nothing in its summary judgment opposition or appellate briefs addresses the voidability of self-dealing contracts by directors that were not approved by the corporate shareholders. (Corp. Code, § 310, subd. (a).)

plaintiff's injuries]; *Christoff, supra*, at pp. 125-126 [plaintiff failed to address trial court determination that summary judgment was proper for lack of causation].)<sup>9</sup>

### 3. *The Attorney's Fee Award Was Proper*

SPV's bylaws provided for attorney's fees to the prevailing party in "any action whatsoever arising from rights and obligations established under these Bylaws, including but not limited to actions for damages resulting from a breach of these Bylaws or actions for specific enforcement hereof, . . ." Defendants moved for fees of up to \$650,000 under this provision, and were awarded fees of \$250,000. Plaintiffs contend no award of fees was proper because: (1) the September 17, 2007, judgment for the officer and director defendants did not include an award of costs; and (2) plaintiffs voluntarily dismissed the remaining claims, meaning defendants could not be prevailing parties for purposes of awarding contractual attorney's fees. (Civ. Code, § 1717, subd. (b)(2).)

These contentions merit little discussion. As to the first, with exceptions not applicable here, prevailing parties are entitled to their costs as a matter of right. (Code Civ. Proc., § 1032, subd. (b).) Items allowable as costs under that section include contractual attorney's fees. (Code Civ. Proc., § 1033.5, subd. (a)(10)(A).) Therefore, the judgment's failure to mention costs is irrelevant. As to the second, although there is no prevailing party for purposes of awarding contractual attorney's fees when a plaintiff voluntarily dismisses his action (Civ. Code, § 1717, subd. (b)(2)), this does not bar recovery as to non-contract causes of action that fall within the terms of an attorney's fees provision. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 615-617.) Plaintiffs did not sue for breach of contract, meaning all their claims fall within this exception.<sup>10</sup>

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<sup>9</sup> The court said it believed there might be a triable issue of fact as to the propriety of the liens because Manny said in his declaration that he had tendered payment of his water bills to SPV. This may well have been the basis for the trial court's determination that triable facts issues existed as to SPV on causes of action one through four.

<sup>10</sup> Plaintiffs do not contend on appeal that the bylaws' broadly-worded attorney's fees provision cannot be construed to cover their non-contract claims.

Furthermore, while plaintiffs dismissed their remaining claims as to SPV after SPV was awarded summary adjudication, the director and officer defendants had obtained summary judgment before that dismissal. As a result, they were clearly prevailing parties in “any action whatsoever arising from the rights and obligations” under the bylaws even under plaintiffs’ thesis.

### **DISPOSITION**

For the reasons set forth above, the judgment for defendants and the order awarding them attorney’s fees are both affirmed. Defendants shall recover their appellate costs.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

MOHR, J.\*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.